IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Society as a whole -- and consumers in particular -- will pay a high price if principles of federalism are extended beyond their proper bounds to immunize unreviewed private anticompetitive conduct at the expense of the "familiar and substantial * * * federal interest in enforcing the national policy in favor of competition." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). Respondents are seeking antitrust immunity for horizontal price-fixing. No antitrust offense is more "dangerous to society." FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768, 781 n.16 (1990) (quoting 7 P.

Areeda, Antitrust Law ¶ 1509, at 412 (1986)). See also United States v. Trenton Potteries Co., 273 U.S. 392, 396-398 (1927). Indeed, the price-fixing at issue here is particularly dangerous, because the state agency provides a convenient mechanism for monitoring and enforcing participation in a cartel. An overly permissive standard of "active supervision" threatens to abrogate the protections of the federal antitrust laws, and to leave consumers substantially unprotected, in a wide variety of industries, professions, and occupations that are subject to some state regulation.

1. Respondents and their amici persistently misstate the Federal Trade Commission's position in this case. As we explain in our opening brief (Pet. Br. 20), our contention is that the "active supervision" prong of the state action test requires "an affirmative determination by state officials that the particular private anticompetitive activity at issue is consistent with State policy." See also Pet. 14; Pet. App. 55a. In the context of this case -- which involves so-called "negative option" systems of regulation, under which private activity is "deemed" approved by state officials by operation of law unless it is disapproved within a specified period of time -- the mere fact that state officials do not object to private anticompetitive activity is not sufficient to demonstrate active supervision. Such regulatory silence is ambiguous, particularly where, as here, state officials have discretion to review, or not review, particular rates. The States' failure to object may reflect the State's determination that the

private activity at issue is consistent with state policy, or it may reflect nothing more than inaction by the State. Consequently, the relevant question for purposes of the state action doctrine is whether state officials have determined that the anticompetitive activity is consistent with state policy.

Rather than addressing the FTC's position, respondents attack a series of straw men. Respondents repeatedly assert (Resp. Br. 1, 20, 21, 26, 32) that the FTC's standard requires federal courts and antitrust agencies to evaluate the quality of decisionmaking by state officials. See also Hartford Ins. Co. Br. 5 (FTC evaluates the "rigor" of state supervision). That is not so. The FTC's legal standard turns on whether state officials have determined that the private activity at issue accords with state policy, not on the quality of the State's determination. Respondents themselves recognize this basic distinction by quoting (Resp. Br. 25) this Court's statement that "the issue is not whether 'the sovereign has acted wisely' but simply whether 'the state [has acted] as a sovereign.'" Hoover v. Ronwin, 466 U.S. 558, 574 (1984). Here, the FTC required only that the State act as sovereign. It is respondents who would expand the state action doctrine to confer antitrust immunity where the State has not acted at all.[1/]

[1/] Respondents' amici suggest (Hartford Ins. Co. Br. 15-16) that the distinction between informal review and approval by state officials and no review at all is insignificant. We disagree. Review of private conduct by state officials is essential to proper confinement of the scope of the implied exemption from the antitrust laws for state action.

We agree that federal courts and antitrust agencies should not scrutinize the quality of a State's determination that private anticompetitive behavior is consistent with the State's policies. See Hoover v. Ronwin, 466 U.S. at 574; 1 P. Areeda & D. Turner, Antitrust Law ¶ 213c, at 75 (1978). In this case, however, state officials did not make any such determination. See Pet. App. 60a-63, 76a. Indeed, Wisconsin and Montana, joined by 34 other States, have filed a brief in support of the FTC stating that "[i]n Wisconsin and Montana there was no review, whatsoever, of the merits of the prices for search and examination services set by respondents." Wis. Br. 11 n.9. Accordingly, there is no occasion in this case "to examine the quality or 'meaningfulness' of state regulatory decisions." Ibid.[2/]

Similarly, respondents assert (Resp. Br. 34) that the FTC would "find[] active supervision only where the cop catches every miscreant and awards a gold star to every law abiding citizen." Respondents' colorful imagery is quite misleading. The legal standard applied by the FTC does not inquire into the quality of the State's determination, let alone its correctness. Consequently, it does not require the State to "catch[] every miscreant." Instead, it requires only that, to the extent private

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[2/] Respondents attempt to minimize the significance of the States' brief in support of the FTC by asserting (Resp. Br. 38-39 n.37) that it is addressed solely to whether the Wisconsin and Montana clearly articulated a policy to displace competition. But as the statements quoted above demonstrate, the States' brief also forcefully takes the position that the States at issue did not actively supervise respondents' price-fixing. See Wis. Br. 8-9, 11, 14 & n.14, 17-22.

parties are left to police themselves, they are subject to the federal antitrust laws.

In yet another variation, respondents suggest (Resp. Br. 25-26 & n.21) that the FTC's test for active supervision turns on whether "the state's attempted exercise of its power is imperfect in execution under its own law." Quoting Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.). See also ALTA Br. 5-6 (FTC would "conduct[] a de novo review of state agency action and * * * determine[] [whether] state regulators properly balanced the interests of state policy against the federal goals of unfettered competition"). Again, respondents misstate the FTC's position. The FTC, applying this Court's state action decisions, inquired whether state officials both have and exercise the power to review particular private anticompetitive actions and reject those that do not accord with the State's policies. So long as state officials have exercised their power to review the anticompetitive activity at issue, the fact that those officials may have committed procedural or substantive errors under state law is irrelevant. Nor does the active supervision test applied by the FTC require federal courts and antitrust agencies to determine whether state officials have properly balanced state policy interests against the federal policy favoring competition.[2/]

[2/] To support their mischaracterizations of the FTC's position, respondents and their amici rely on isolated statements in the FTC's opinion that the States' regulatory activity was not "meaningful," as well as on statements in the separate opinions of Commissioners Strenio and Azcuenaga. As we explain in our Reply Brief at the certiorari stage (Pet. Reply Br. 1-3), respondents' reliance, out of context, on the Commission's references to

2. a. Respondents make a determined effort to obscure the basic fact that, in each of the States at issue, state officials did not determine whether respondents' price-fixing was consistent with state policy. For example, respondents' lengthy (and one-sided) review of the evidence concerning Montana (Resp. Br. 13-16) fails to mention the FTC's key factual finding that respondents' rates "went into effect without being examined." Pet. App. 76a. In discussing Wisconsin, respondents go further and assert (Resp. Br. 41) that the FTC's decision "was not based on an absence of regulatory review and approval by the State." That is simply wrong. The Commission found that (1) respondents' 1971 rate filing remained in effect for years even though respondents had not submitted the data necessary to justify the rates, Pet. App. 60a-61a; (2) respondents' 1981 filing was checked only for mathematical accuracy, id. at 61a; (3) respondents' 1982 filing was "not even checked for accuracy," ibid.; (4) "nearly two dozen endorsements and amendments went into effect without being examined at all," id. at 63a, and (5) no hearing has ever been held in Wisconsin on any insurance rate, and no rate suspension order has ever been issued, id. at 60a. Wisconsin and Montana have filed a brief stating that,

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"meaningful" review is unjustified in light of the holding of the Commission that "the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate." Pet. App. 55a. The short answer to respondents' reliance on the separate opinions of Commissioners Strenio and Azcuenaga is that they are not the Commission's opinion. Moreover, Commissioner Azcuenaga agreed with the Commission that "the active supervision requirement is satisfied only where a state official or agency has engaged in a 'substantive review' of the collective rate proposals." Pet. App. 111a.

in both States, "there was no review, whatsoever, of the merits of the prices for search and examination services set by respondents." Wis. Br. 11 n.9.[4/]

b. It is not surprising that state officials did not determine whether respondents' rates were consistent with state policy, because state law required no such determination. As Wisconsin and Montana (joined by Arizona and other States) explain (Wis. Br. 25-27 & nn.26, 27), state statutes give insurance regulators discretion to review, or not review, particular rate filings for compliance with the State's regulatory criteria.[5/]

[4/] Similarly, the FTC found, as to Arizona, that there was "no convincing evidence that [respondents'] rate was * * * reviewed by the state," and that "the record is inconclusive as to the kind of review, if any," that minor rate filings received. Pet. App. 67a, 68a. As to Connecticut, the FTC found that crucial components of respondents' rates "were not being supervised at all," and that filings that did not involve generalized rate increases were "simply ignor[ed]." Pet. App. 56a, 60a.

[5/] See Mont. Code Ann. § 33-1-311(3) (J.A. 188) ("The commissioner may conduct such examinations and investigations * * * as he may deem proper."); id. § 33-1-701(1) ("The commissioner may hold hearings for any purpose within the scope of this code deemed by him to be necessary."); id. §33-1-317 (J.A. 191) ("The commissioner may, after having conducted a hearing pursuant to § 33-1-701, impose a fine."); id. § 33-1-318 ("Whenever it appears to the commissioner that a person has engaged in or is about to engage in an act or practice constituting a violation of [this act, he] may * * * issue an order directing the person to cease and desist."); Wis. Stat. § 601.41(5) (J.A. 201) ("The commissioner may at any time hold informal hearings * * * for the purposes of investigation"); id. § 601.43(1)(a) (J.A. 203) ("Whenever the Commissioner deems it necessary in order to inform himself or herself about any matter related to the enforcement of chs. 600 to 647, the commissioner may examine the affairs and condition of * * * any person or organization of persons doing * * * insurance business in this state."); id. § 625.21 ("If the commissioner finds that competition is not an effective regulator of rates * * * he or she may promulgate a rule."). See also Ariz. Rev. Stat. Ann. § 20-365 (J.A. 166) ("Cooperation among rating organizations and insurers in rate making * * * is authorized * * *. The director may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is * * * inconsistent with the provisions of this article, he may issue a written order * * * requiring the discontinuance of such activity or practice."); Conn. Gen. Stat. Ann. § 38-201x(2) (J.A. 184) ("A filing shall be deemed to meet the requirements of this chapter, unless disapproved by the commissioner within the waiting period or any extension thereof.").

Thus, the court of appeals was incorrect in concluding (Pet. App. 30a, 33a, 34a, 36a) that state officials were required to reject any rates that did not meet the State's regulatory criteria.[6/] Indeed, respondents concede that "proposed rates in the four States at issue were effective if the state agency took no affirmative action to challenge the filed rate," and argue that unreviewed private conduct should be exempt from the antitrust laws if state regulators have chosen to allocate scarce resources to other matters that they deem more important. Resp. Br. 35 & n.31.

Respondents also concede (Resp. Br. 37) that "the existence of judicial review mechanisms alone" is not sufficient to meet the active supervision requirement, and they do not seriously defend the court of appeals' erroneous conclusion that consumers can obtain writs of mandamus in the States at issue. Respondents argue (ibid.), however, that the FTC failed to take account of "the

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[6/] The statutes cited by the court of appeals and respondents provide only that rates shall not be excessive, inadequate, or unfairly discriminatory, that state officials shall see that the provisions of the insurance laws are faithfully executed, and that, if the state official determines, after a hearing, that a rate does not meet the State's criteria, the rate must be rejected. See Ariz. Rev. Stat. Ann. §§ 20-375(A), 20-376(D) (J.A. 167-168); Conn. Gen. Stat. Ann. §§ 38-4, 38-201p(b), 38-201x(b)(2) (J.A. 171, 178, 186); Mont. Code Ann. §§ 33-1-311, 33-16-205 (J.A. 188, 196); Wis. Stat. Ann. §§ 601.41(1), 625.22 (J.A. 201, 208). These general provisions do not require state officials to examine and approve or disapprove every rate. See Wis. Br. 25-27.

mechanisms for administrative and direct judicial review of rate review matters that are embodied in the statutes of all four States." But those provisions are not sufficient to satisfy the active supervision requirement, for two reasons. First, as the brief for Wisconsin and Montana explains (Wis. Br. 25-27), state officials have discretion to decide whether to grant a consumer's request to hold hearings on particular rates. The leading case holds that "the investigation of consumer complaints * * * and the resulting action, if any, fall within the Commissioner's expressly-provided, discretionary powers." Gerber v. Commissioner, 242 Mont. 369, 786 P.2d 1199, 1200 (1990). The statutory provisions on which respondents rely do not require a hearing upon demand, but only if state officials determine that the consumer's complaint is supported by probable cause, made in good faith, or would "otherwise justify a hearing."[7/] It thus appears that an aggrieved consumer could obtain very limited, if any, judicial review of a state official's decision to deny a hearing. Respondents fail to cite a single case in which a court in one of the States at issue ordered an insurance regulator to grant a consumer's request to hold a hearing on a rate.

Second, and more fundamentally, even if the state statutes afforded consumers a right to a hearing on demand, such a right would not constitute active state supervision. As we explain in our opening brief (Pet. Br. 26-27), the active supervision

[7/] See Ariz. Rev. Stat. § 20-378(B) (J.A. 170-171); Conn. Gen. Stat. Ann. § 38-201p(a), (b) (J.A. 177-178); Mont. Code Ann. § 33-16-204 (J.A. 196-197); Wis. Stat. Ann. § 227.42.

requirement is not met where private parties are allowed to engage in anticompetitive activity, subject only to the possibility that consumers will bring costly litigation in order to obtain post hoc review by state officials.[8/]

3. This Court's state action decisions have emphatically indicated that private anticompetitive activity is not exempt from the federal antitrust laws unless state officials have determined that the activity accords with the State's policies. The Court has explained that the state action exemption from the federal antitrust laws applies only where "the State effectively has made [the anticompetitive] conduct its own." Patrick v. Burget, 486 U.S. 94, 106 (1988). Private parties are presumed "to further [their] own interests, rather than the governmental interests of the State." Id. at 100. Consequently, the state action doctrine does not immunize private anticompetitive conduct unless state officials both "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Id. at 101 (emphasis added).

Respondents incorrectly assert (Resp. Br. 29) that "no decision of this Court has ever found an absence of active supervision where there was state authority to engage in substantive review of the regulated private conduct." In 324

[8/] Because consumers cannot be assured of a hearing, the suggestion (Hartford Ins. Co. Br. 20 n.9) that the filed rate doctrine provides a "useful analogy" is unpersuasive. As amici themselves recognize, "[t]he theory underlying [that] doctrine is that interested parties should be required to press challenges to the validity of the rate before the body with the power and expertise to make the public interest determination." Ibid.

Liquor Corp. v. Duffy, 479 U.S. 335 (1987), the state agency had authority to alter the prices set by private parties in response to market conditions, by permitting wholesalers to depart from their posted prices or by permitting retailers to sell below "cost." Id. at 345 n.7. The Court nevertheless held that the active supervision requirement was not met because the agency did not "exert[] any significant control over * * * prices." Ibid. See also Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (finding absence of state action even though the state agency had authority to review the private activity at issue).[3/]

Respondents criticize the standard applied by the FTC on the ground that private parties will be unable to predict or determine whether their conduct has been actively supervised by the State.

[3/] Contrary to the assertion of respondents' amicus (Hartford Ins. Co. Br. 16-17 n.5), this Court has recognized that "analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to the state-action inquiry conducted pursuant to § 1983 and the Fourteenth Amendment." NCAA v. Tarkanian, 488 U.S. 179, 194 n.14 (1988). To be sure, the Court said in Blum v. Yaretsky, 457 U.S. 991, 1004-1005 (1982), that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." But the kind of "approval" that the Court appeared to have in mind was precisely the type of passive acquiescence that is at issue in this case. In the antitrust context, as in the Fourteenth Amendment context, "[t]he purpose of [the state action] requirement is to assure * * * that the State is responsible for the specific conduct of which the plaintiff complains. Id. at 1004. Thus, the state action doctrine requires "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). In light of these basic similarities, it would be odd if private action could be converted into state action for purposes of the antitrust laws without state approval, while even state approval of private action does not suffice for purposes of the Fourteenth Amendment.

Resp. Br. 26. Respondents' criticism rests primarily on their mistaken assertion that the FTC's standard involves post hoc federal review of the quality of state supervision. As we have explained, (p. __, supra), however, it is the fact of state approval, not its quality, that matters. The standard applied by the FTC requires private parties to (1) identify the specific private conduct at issue, and (2) determine whether state officials have approved that conduct as consistent with state policy. The first requirement should pose no difficulty, and minimizes uncertainty about the scope of antitrust immunity. In many cases, the second requirement will also pose no difficulty. For example, there may be a written decision or other record of the state agency's action. Absent such a record, there is no reason why private parties should not bear the burden of contacting state authorities to determine whether their conduct has been approved. To be sure, private parties may not be able to predict with certainty whether such approval will be forthcoming, but that kind of uncertainty is inherent in the requirement that state officials both have and exercise the power to determine whether private anticompetitive activity is consistent with state policy. As leading commentators observe, where a private party wishes to avail itself of the state action exemption in order to engage in conduct that would otherwise violate the federal antitrust laws, it is not "inappropriate * * * to instruct regulated firms that they cannot

count on antitrust immunity unless they invite and actually receive state supervision." 1 Areeda & Turner, supra, ¶ 213, at 79.[10/]

4. Respondents' effort to defend the court of appeals' "basic level of activity" test is unconvincing. Although respondents contend (Resp. Br. 31) that the court of appeals' test properly balances "the federalism principles underlying the state action doctrine and the evidentiary purpose of the active supervision requirement," in fact the test serves neither principles of federalism nor the antitrust goal of promoting competition. As some of respondents' amici candidly recognize, the court of appeals' test invites federal courts and antitrust agencies to conduct an unfocused inquiry into the full range of the State's regulatory actions. ALTA Br. 6. Moreover, because the

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[10/] The court of appeals decisions respondents cite (Resp. Br. 29 & n.24) do not support their contention that the active supervision requirement is satisfied by the mere "existence of a statutory system of regulation." In Capital Telephone Co. v. New York Telephone Co., 750 F.2d 1154 (2d Cir. 1984), cert. denied, 471 U.S. 1101 (1985), the court of appeals agreed with the district court's determination that the State's regulatory program provided for "comprehensive ongoing involvement by the state in the functioning of telephone corporations." 750 F.2d at 1163. Moreover, both the court and the dissenting judge noted that in practice the State investigated and determined the rates. Id. at 1164, 1168. In Llewellyn v. Carothers, 765 F.2d 769, 773 (9th Cir. 1985), most of the challenged conduct was of two state officials, rather than private parties. And the court found that the private activity at issue was "mandated" by the government. Id. at 775. In Marrese v. Interqual, Inc., 748 F.2d 373 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985), the court found that the state agency "reviews the * * * determinations of medical peer review committees." 748 F.2d at 390. Although the court did not address whether review had actually occurred in that case, it was clear that the plaintiff had short-circuited the state review procedures by filing a federal antitrust action. Moreover, the Ninth Circuit later concluded (Patrick v. Burget, 800 F.2d 1498, 1506 (1987), rev'd, 486 U.S. 94 (1988)) that the statutory scheme at issue in Marrese was "nearly identical" to the scheme at issue in Patrick.

court of appeals' test does not specify the amount or type of activity that suffices to meet the "basic level" standard, it provides little guidance to private parties or federal courts. Id. at 7.[11/]

Apart from those shortcomings, the fatal defect in the court of appeals' legal standard is that it confers antitrust immunity on private conduct that state officials have not determined to be consistent with state policies. As respondents themselves recognize (Resp. Br. 23), the active supervision requirement serves the "evidentiary function" of "ensuring that the [private] actor is engaging in the challenged conduct pursuant to state policy." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985). Respondents candidly acknowledge (Resp. Br. 35) that the court of appeals' standard would allow "proposed [private] action to become effective without affirmative approval." Absent evidence of a determination by state officials, however, there is no evidence that anticompetitive conduct furthers state policies, and private parties can be expected to act to further their own interests rather than the public interest. See Town of Hallie, 471 U.S. at 47. "The national policy in favor of competition cannot be

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[11/] The court of appeals' application of its test suggests that, in that court at least, almost any activity by state officials will do. Respondents assert (Resp. Br. 31 n.26) that mere inaction or passive acquiescence on the part of state officials would not be sufficient to pass the "basic level of activity" test. But the court of appeals found a "basic level of activity" in Wisconsin and Montana even though it did not question the FTC's findings that Wisconsin and Montana did not review respondents' rates. It thus appears that the court of appeals would be satisfied by a "basic level of activity" that is unrelated to the rate filing at issue.

thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 324 Liquor, 479 U.S. at 345 (quoting Midcal, 445 U.S. at 106).

5. Some of respondents' amici would reject the court of appeals' test in favor of a "structural" approach to active supervision that looks solely to the regulatory framework established by state statutes. See AIA Br. 24-30; ALTA Br. 7; Hartford Ins. Co. Br. 11. Respondents themselves do not propose a "structural" test, and it is even less satisfactory than the court of appeals' standard.

A pure "structural" test would transform the requirement that state officials "have and exercise" the power to supervise private anticompetitive activity, Patrick, 486 U.S. at 101, into a requirement that state officials merely have such power, whether or not it is exercised. It is settled that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." Parker v. Brown, 317 U.S. 341, 351 (1943); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1353 (1991). Consequently, the States cannot confer antitrust immunity simply by enacting a statute (other than a self-executing statute). They must actually displace competition with "an adequate system of regulation," 324 Liquor, 479 U.S. at 345 (emphasis added), that actively supervises private anticompetitive conduct. As discussed below (p. __, infra), we agree that a statutory requirement that state officials review particular private conduct is persuasive

evidence that such review actually occurred. But it is actual supervision by state officials, not theoretical supervision provided for by statute, that provides assurance that private anticompetitive activity is consistent with the State's policies.[12/]

A "structural" approach to active supervision would inevitably bog the federal courts down in litigation over whether particular regulatory systems satisfy the active supervision requirement. As the federal courts developed a catalog of structures that did or did not pass muster, they would "limit" the States' regulatory options in precisely the way that respondents and their amici accuse the FTC of limiting regulatory options. Rather than evaluating the States' entire regulatory structure for compliance with federal norms, it is simpler and less intrusive -- and much more pertinent -- for federal courts and agencies to inquire whether state officials have reviewed and approved the particular private conduct at issue.[13/]

[12/] Because state officials had no duty under state law to review every rate filing, respondents and their amici err in relying on the "presumption of regularity" in this case. In any event, as respondents recognize (Resp. Br. 30 n.25), the presumption of regularity is rebuttable. See INS v. Miranda, 459 U.S. 14, 18 (1982) (per curiam); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). Here, the FTC found that state officials did not review respondents' collective rates. Thus, even if a presumption of regularity were applicable in this context, it would be rebutted.

[13/] Respondents' amici assert (Hartford Ins. Co. Br. 14) that the regulatory systems at issue here are similar to federal rate regulation schemes that are understood to displace the antitrust laws. But there is a crucial distinction between express legislation by Congress applicable to a particular sector of the economy and the judicially implied exemption of Parker v. Brown. As Professors Areeda and Turner have noted,

In any event, the regulatory systems at issue here would not pass a "structural" test, because they give state officials discretion to review, or not review, rates. Respondents' amici are incorrect in asserting (Hartford Ins. Co. Br. 13, 14) that the "regulatory system described in Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985), is essentially identical to those in the present case" and is "a prototype of active supervision." In Southern Motor Carriers, the States' regulatory agencies consistently held hearings and determined whether the private conduct at issue met the State's standards. See United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471, 476 (N.D. Ga. 1979). Consequently, the government conceded that the active supervision requirement was met. 471 U.S. at 62. Here, in contrast, the state agencies did not make such determinations. Indeed, in at least one State (Wisconsin), the state agency has never rejected a rate or even held a rate hearing. See Pet. App. 60a. Thus, the regulatory systems at issue in this

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> At the national level, Congress can and has been understood to displace the antitrust laws for a particular industry or practice with a regulatory regime, such that objections to the private behavior are to be handled by the regulators and not by the antitrust courts. [See, e.g., United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975).] * * * And, of course, Congress may do so with respect to state regulatory regimes as well * * *. But the idea of Parker immunity, based as it is on implication rather than on express direction, seems to require actual state approval.
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> 1 P. Areeda & D. Turner, supra, ¶ 213f, at 78.

case differ sharply from those at issue in Southern Motor Carriers, even if the statutes bear a family resemblance.[14/]

6. Respondents and their amici assert that the legal standard applied by the FTC is inconsistent with principles of federalism. The brief of Wisconsin, Montana, and Arizona, joined by 33 other States, refutes that assertion. Those States agree that if no state official "specifically reviewed the anticompetitive conduct at issue, * * * there can be no state action immunity." Wis. Br. 11. That result is fully consistent with principles of federalism. Where the State has not reviewed and approved private conduct, it is not "truly the government," rather than "the regulated private entities, which is replacing competition with regulation." Community Communications Co. v. City of Boulder, 455 U.S. 40, 70 (1982) (Rehnquist, J., dissenting).[15/]

[14/] This case does not present the question whether the active supervision requirement is met where state officials review some, but not all, private anticompetitive activity. The Commission found no active supervision in the States at issue even though it concluded that "it would not be incumbent upon a respondent to show that every single piece of data filed with a rate commission was reviewed." Pet. App. 54a. Instead, the Commission "look[ed] at the review activity as a whole and [sought] to determine whether there was a general program of supervision -- not whether each and every rate was reviewed." Ibid.

[15/] California, joined by three other States, has filed a brief arguing that principles of federalism require federal courts and antitrust agencies to defer to state regulation "where States meet objective standards signifying the displacement of competition." Cal. Br. 11. California also argues that "it is the fact of supervision" that determines whether the active supervision requirement is met. Id. at 16. In this case, however -- as Wisconsin, Montana, Arizona, and 33 other States recognize -- the States did not meet the objective standard for active supervision, because they did not in fact review or approve respondents' price-fixing.

Respondents incorrectly contend (Br. 34) that the standard of active supervision applied by the FTC would reduce the range of regulatory options available to the States by requiring "[v]isible, affirmative determinations, in advance, by state officials that planned private conduct comports with state policy." In particular, there is no basis for the suggestion (Penn. Elec. Ass'n Br. 4; Cal. Br. 7) that the FTC's standard would require the States to adopt the procedures of the federal Administrative Procedure Act. The standard applied by the FTC does not confine the States' choice of procedures for determining whether private conduct is consistent with state policy. On the contrary, the FTC expressly rejected complaint counsel's argument that the State's determinations must follow a "standard loosely based upon the Administrative Procedure Act." Pet. App. 58a n.9. Because the standard of active supervision applied by the FTC is satisfied by informal review procedures, predictions of regulatory "gridlock" (Penn. Elec. Ass'n Br. 17) are grossly overstated. It is true that forms of state regulation that do not result in a determination that particular private conduct is in accord with state policy will not confer antitrust immunity on private anticompetitive conduct. But that type of "limitation" on state regulatory options is inherent in the active supervision requirement. This Court's

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California's intimations (Br. 11-12) that the standard applied by the FTC is unconstitutional are wholly unfounded. Although Parker is based on a reluctance to attribute to Congress "an unexpressed purpose to nullify a state's control over its officers and agents," Parker v. Brown, 317 U.S. 341, 350-351 (1943), no decision of this Court has ever suggested that the Parker immunity for the conduct of private parties is constitutionally required.

decisions in Midcal, supra, 324 Liquor, supra, and Patrick, supra, each imposed such a limitation.[15/]

Respondents' amici are off the mark in asserting (Hartford Ins. Co. 20-21) that the standard applied by the FTC, based on this Court's decisions, is judicially unmanageable. The question whether state officials have approved particular private conduct is not beyond the competence of federal courts or antitrust agencies. Where the state agency has issued a written decision or order, the answer should be obvious. Where there is no such written evidence, it should be relatively easy to answer the question in most cases on the basis of other evidence, including statements from state officials. We agree with respondents and their amici that the fact that officials are required by state statute to make such a determination is relevant to determining whether they made such a determination in a particular case. In this case, however, state officials were not required to make such

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[15/] Indeed, 36 States forcefully argue that adopting the court of appeals' active supervision standard would actually limit the States' regulatory choices, by making it difficult for the States to adopt modest regulatory programs that rely in part on competition. Wis. Br. 15-16. Respondents' amici may be correct in arguing (Hartford Ins. Co. Br. 23) that "[a] State that does not want to invoke Parker need only make clear in the governing statute that it does not intend to prescribe a different policy." But it would be quite burdensome for state legislatures to add such provisions to all regulatory statutes (including the large body of regulatory statutes already in existence). Such an approach would require state legislatures to "consciously consider" the anticompetitive effects of regulation in order to avoid the possibility of unintentionally creating antitrust immunity. Ultimately, of course, the scope of implied immunity must be determined by interpreting the federal antitrust laws themselves, not by a State's failure to declare that those laws have not been superseded.

a determination, and the FTC found that state officials had not in fact determined that the rates at issue were consistent with state policy. See Wis. Br. 11 & n.9, 25-27.

7. Finally, respondents contend (Resp. Br. 46-48) that the court of appeals did not fail to defer to the FTC's findings of fact as to Arizona and Connecticut, but instead applied the correct legal standard to the facts as found by the FTC. In our opening brief, we explain (Pet. Br. 27-31) that the court of appeals disregarded the Commission's findings that there was no convincing evidence that respondents' 1968 rate filing was reviewed by Arizona officials, that Connecticut officials did not supervise some crucial elements of respondents' rates at all, and that Connecticut officials ignored rate filings that did not involve generalized rate increases.

Respondents make no effort to argue that, despite these factual findings, the court of appeals was entitled to conclude that state officials reviewed and approved the rates at issue. Instead, respondents argue (Resp. Br. 47) that the FTC's findings were no more than "criticisms of the quality of the programs in those two States," and so were properly disregarded by the court of appeals.

Respondents' argument misses the point. If the court of appeals was correct in holding that active state supervision does not require state officials to determine that private anticompetitive activity is consistent with state policy, then of course it makes no difference that the court of appeals failed to

defer to the Commission's findings that Arizona and Connecticut did not make such determinations. But if, as we submit, active supervision does require such a determination, then the court of appeals' failure to defer to the FTC's findings is significant and warrants reversal.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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